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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Jane Doe #1; *et al.*,

Plaintiffs,

v.

Chad Wolf, Acting Secretary, United
States Department of Homeland
Security, *et al.*,

Defendants.

Case No. 15-cv-250-TUC-DCB

**DEFENDANTS' SURREPLY TO
PLAINTIFFS' RESPONSE**

CLASS ACTION

Date: March 26, 2020

Hon. David C. Bury

DEFENDANTS' SURREPLY TO PLAINTIFFS' RESPONSE

A. Bed. A raised platform with a mat, as Defendants propose, would cure the deficiency that the court identified as "floor sleeping." Indeed, there is no

1 constitutional right to comfort when sleeping. “The fact that a detention interfered
 2 with a prisoner's desire to live as comfortably as possible does not convert the
 3 conditions of confinement into punishment.” *Lee v. Hennigan*, 98 F. App'x 286,
 4 288 (citing *Bell v. Wolfish*, 441 U.S. 520, 537; 539 (1979)). And mats atop a raised
 5 platform are an acceptable, industry-standard bed for detention facilities, even if
 6 they may not be as subjectively comfortable as a mattress.¹ *See Smith v. Brady*,
 7 No. 4:17-CV-P163-JHM, 2018 WL 1787740, at *2 (W.D. Ky. Apr. 13, 2018)
 8 (“Plaintiff's allegations that HCDC is crowded, that inmates must...sleep on mats
 9 rather than beds...are not deprivations of the minimal civilized measure of life's
 10 necessities.”); *see also Roundtree v. NYC*, No. 15-CV-8198, 2015 WL 13855925,
 11 at *1–*2 (S.D.N.Y. Nov. 17, 2015) (granting the plaintiff leave to amend his
 12 complaint because his allegation that his “steel bed” was too short for his height
 13 and that his “child’s play mat for a mattress” caused back pain were insufficient to
 14 overcome a motion to dismiss). The ability to use mats on raised platforms is
 15 especially important for CBP—where there is a high turnover of detainees due to
 16 the short detention duration—because mats, unlike mattresses, are easily
 17 cleanable and durable. Further, requiring CBP to provide pillows, cloth blankets,
 18 *and* cloth sheets to meet minimal due process standards lacks support in the
 19 record. The Court should instead require that CBP follow detention-industry
 20 standards for bedding, which may not necessarily include all three of these items.

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 22
 23 ¹ Indeed, even a simple search on Google for “jail bed” will bring up hundreds of pictures
 24 of raised platforms with mats, as this is the industry standard.
 25 [https://www.google.com/search?q=jail+bed&sxsrf=ALeKk02Bh9-](https://www.google.com/search?q=jail+bed&sxsrf=ALeKk02Bh9-mgaQqGgaiQrVbPEFEiRMSzw:1585156048277&source=lnms&tbn=isch&sa=X&ved=2ahUKEwjQ8K65jrboAhVIY6wKHXTABvYQ_AUoAXoECA0QAw&biw=1468&bih=678)
 26 [mgaQqGgaiQrVbPEFEiRMSzw:1585156048277&source=lnms&tbn=isch&sa=X&ved=](https://www.google.com/search?q=jail+bed&sxsrf=ALeKk02Bh9-mgaQqGgaiQrVbPEFEiRMSzw:1585156048277&source=lnms&tbn=isch&sa=X&ved=2ahUKEwjQ8K65jrboAhVIY6wKHXTABvYQ_AUoAXoECA0QAw&biw=1468&bih=678)
 27 [2ahUKEwjQ8K65jrboAhVIY6wKHXTABvYQ_AUoAXoECA0QAw&biw=1468&bih=](https://www.google.com/search?q=jail+bed&sxsrf=ALeKk02Bh9-mgaQqGgaiQrVbPEFEiRMSzw:1585156048277&source=lnms&tbn=isch&sa=X&ved=2ahUKEwjQ8K65jrboAhVIY6wKHXTABvYQ_AUoAXoECA0QAw&biw=1468&bih=678)
 678 . For an example of traditional detention mats on a raised platform, *see, e.g.*, Bob
 Barker Mats [America’s Leading Detention Supplier],
<https://www.bobbarker.com/products/mattresses.html>.

1 **B. Exigent Circumstances.** Plaintiffs misapprehend Defendants’ proposed language
2 of “any such occurrences that may affect receiving agencies and their ability to take
3 custody of individuals from CBP.” Although capacity constraints are an example of
4 when a receiving agency cannot accept CBP transfers, Defendants intentionally
5 included the caveat that “periodic surges across the border” are not exigent
6 circumstances. ECF 485 at 3, lines 12–13. Other, less frequent occurrences,
7 however, may constitute an exigent circumstance at a receiving agency, such as Acts
8 of God/natural disasters; other emergencies (fires, terrorism, etc.); full or partial
9 government shutdown; or public health concerns in a particular facility. Plaintiffs
10 and Defendants seem to agree that such exigent circumstances at Tucson Sector—
11 as well as at receiving agencies—would fall into the “exigent circumstances”
12 exception. *See* ECF 487, at 4, lines 13–16. Also, the parties likely agree about the
13 scope of “public health concerns”: Defendants’ proposed addition states that only
14 “*extreme* circumstances caused by an event outside of CBP’s control” would
15 constitute an exigent circumstance. Thus, public-health events that are relatively
16 common and not “extreme,” such as lice or scabies, would probably not constitute
17 a public health concern.

18 **C. Medically-Trained Professional.** Plaintiffs’ objection to including the medical
19 personnel currently employed by Tucson Sector to complete medical assessments
20 lacks support in the record. The Court found that medical assessments are
21 performed by “medical personnel, who provide in-house medical examinations
22 and/or applicable medical care...” ECF 482 at 30, ¶ 63. Dr. Tarantino testified
23 that the “medical personnel” at the TCC is a team consisting of an advanced
24 practice provider, which is a physician assistant or nurse practitioner, and two
25 technicians, such as an EMT or medical assistant. TR Day 5: Dr. Tarantino (ECF
26 475) at 14, lines 10–14. These “medical personnel” provide assessments, but if an
27

1 EMT or medical technician performs the assessment, certain portions must be
2 performed under the direct supervision of the advanced practice provider. *Id.* at
3 33, lines 8–14. Thus, the medical personnel team currently employed 24/7 at TCC
4 should be included in the definition of “Medically-Trained Professional” to
5 provide medical assessments.

6 **D. Time in Detention.** Plaintiffs’ proposal that the Time in Detention should be
7 calculated at time of book in at any CBP station would create a remedy beyond the
8 scope of the Court’s Findings of Fact and Conclusions of Law, which is based on
9 conditions at the Tucson Sector. *See* ECF 482 at 1. Because Tucson Sector has no
10 control over how much time detainees spend in custody at other sectors, adopting
11 Plaintiffs’ definition of “Time in Detention” would allow Plaintiffs to enforce this
12 provision against Tucson Sector, even if Tucson Sector had no hand in a particular
13 detainee’s time in custody. For example, Plaintiffs’ proposed language would
14 allow Plaintiffs to move for civil contempt under this provision if an individual
15 spends 50 hours in a different sector before being transferred to Tucson Sector—a
16 situation that the Tucson Sector had no control over. Thus, the Court’s order
17 should be Tucson Sector specific: when a person is booked in at Tucson Station,
18 the 48-hour window begins.

19 **E. Section 3.** The Court should require that CBP follow detention-industry standards
20 for bedding, which includes a cloth blanket, but may not necessarily include a
21 pillow and sheets. *Bell*, 441 U.S. at 537, 539 (“The fact that a detention interfered
22 with a prisoner's desire to live as comfortably as possible does not convert the
23 conditions of confinement into punishment.”). The permanent injunction will set a
24 constitutional “floor” for Tucson Sector; however, this does not prevent Tucson
25 Sector from exceeding this threshold requirement.

1 **F. Section 5.** Defendants do not propose to “confiscate” mats; rather Defendants
2 propose that, to prevent overcrowding, mats may be retrieved “so long as no
3 detainee is deprived of a mat for more than twelve hours in a twenty-four hour
4 period.” In other words, every detainee would have a mat for at least 12 hours
5 during each 24-hour period. This would provide individuals with a 12-hour
6 window in which to sleep if they choose to.

7 **G. Sections 11 & 12.** Continuing video monitoring is unwarranted because Plaintiffs
8 have not cast doubt on Defendants’ ability or willingness to comply. The remedy
9 for a constitutional violation must be “limited” to the “inadequacy that produced
10 the injury in fact.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (citing *Missouri v.*
11 *Jenkins*, 515 U.S. 70, 88 (1995) (holding that the remedy must be limited to the
12 “nature and scope of the constitutional violation.”)). Here, because the Court found
13 no evidence that Tucson Sector intended to create punitive conditions, nor did it
14 find non-compliance with the November 18, 2016, Preliminary Injunction Order
15 (ECF 244), there is no reason to believe Tucson Sector will not comply with the
16 permanent injunction. ECF 482 at 5, lines 15–17. Thus, as the costly and
17 burdensome remedy of providing video far exceeds the nature and scope of the
18 constitutional violation that the Court found in this case, video monitoring is an
19 improper remedy. However, if the Court does find that video monitoring is
20 necessary to remedy the unconstitutional custody conditions after 48 hours,
21 Defendants request that the monitoring be limited in scope. Defendants would
22 propose that Defendants have the ability to choose the systems used for video
23 monitoring so that Tucson Sector may continue upgrading its technology as
24 needed, and that, should this Court order video monitoring to assure that the terms
25 of the permanent injunction are being met after 48 hours, the Parties provide a
26 separate, agreed-upon process to the Court.

1 Further, because video data is burdensome and sometimes, due to technical
2 difficulties, its delivery may be delayed, Defendants would propose that the Court
3 prohibit video-production issues—alone—from forming the basis of future
4 lawsuits, motions to enforce, or civil contempt.

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6 DATED: March 26, 2020

By: /s/ Katelyn Masetta-Alvarez

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